IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DALE L. SIEBERT and CAROL SIEBERT, husband and wife, Appellants, v. BOGART SIDING, INC. and MILGARD MANUFACTURING, Defendants, and OWENS NW PAINTING CONTRACTORS, Respondent.	)	No. 61769-9-I DIVISION ONE UNPUBLISHED OPINION FILED: May 18, 2009

Appelwick, J. — On a housing construction site, a subcontractor who violates the Washington Industrial Safety and Health Act of 1973, owes a duty to employees of the general contractor only where a dangerous condition is created or controlled by the subcontractor. Because Owens did not create the hazard nor was it in control of the

area when Dale Siebert fell, it had no duty to him. We affirm.

Facts

In June 2005, Dale Siebert worked as a carpenter on the Bakerview Townhomes construction site, in Bellingham, Washington. Since 1989, Homestead NW Development Company employed Siebert as a carpenter. On June 17, 2005 Siebert was working at the Bakerview project, where Homestead was the general contractor, wrapping a beam on a second story deck of Building 1-A. The deck level is approximately 10 feet from the ground. Focused on his work, Siebert claims he did not notice a missing safety railing on the side of the deck. As he moved from left to right, Siebert inadvertently stepped off the deck and fell to the ground. As a result of injuries related to the fall, Siebert is now a paraplegic. Christopher Funkhouse, who was working alongside Siebert at the time of the accident, testified that he warned Siebert of a lack of a railing immediately preceding the fall. Siebert denies any discussion of the missing railing occurred.

On September 21, 2005, Siebert filed a personal injury action related to his fall, alleging that several subcontractors, Owens NW Painting Contractors and Bogart Siding, Inc., negligently removed and failed to replace safety rails on the second floor deck of Building 1-A. Siebert amended the complaint to add Milgard Manufacturing as a defendant. Siebert agreed to stipulated dismissals of the claims against Bogart and Milgard. The trial court entered orders dismissing the claims with prejudice. Neither Bogart or Milgard are party to this appeal.

On April 6, 2007, Owens moved for summary judgment, arguing that as a

subcontractor it did not have a duty to Siebert, an employee of the general contractor, nor did any evidence indicate that Owens had been negligent.

The record establishes that several subcontractors worked daily at the Bakerview construction site. Homestead employee Dustin Hartman was instructed to ensure that safety railings were in place throughout the construction site.

Bogart worked on Building 1-A from May 2, 2005 through May 16, 2005. Two employees of Bogart, including Samuel Villegas, testified that the Bogart work crew removed the temporary railings on Building 1-A, in order to install the siding. Villegas could not recall putting the railings back in place, nor did he recall any supervisor instructing him to do so. He testified, "[a]fter the guy fell, yeah, we heard that we've got to put them up now and we've got to -- since -- if we were to take down a rail, we had to put it back up. They were more on us."

Homestead hired Owens to paint both the interior and exterior of Bakerview. Owens' employees started work on Building 1-A, at Bakerview, on June 6, 2005. When Owens' employee, Eric Queen, arrived at the Bakerview construction site there were no railings of any kind on the decks of Building 1-A. Queen declares that he did not ask for the railings to be removed nor did he remove them himself. While painting Building 1-A, Owens' employee, Christopher Rhodes, observed the lack of railings on the building and complained to his supervisor, Queen. When asked if work should proceed without the railings, Queen responded, "go ahead and go back there and just get it painted," and "[j]ust go paint." A project manager and a carpenter for Homestead testified that they did not see Owens remove the railings from Building 1-A. Owens

completed work on that building on June 10, 2005. Seven days after Owens left the worksite, Seibert fell from the deck.

The trial court granted Owens' motion for summary judgment. Siebert appeals.

Analysis

I. Standard of Review

Siebert appeals the trial courts grant of summary judgment to Owens. He argues that Owens owed him a duty based on statutory, contractual, and common law grounds.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). We review a summary judgment order by engaging in the same inquiry as the trial court, viewing the facts of a case and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996); Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003). The nonmoving party must set forth specific facts to defeat a motion for summary judgment. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

II. Statutory Duty

First, Siebert argues that Owens owed him a statutory duty to replace or seek replacement of the missing guardrail. He argues that the Washington Industrial Safety and Health Act of 1973 (WISHA), specifically, RCW 49.17.060(1)[1] and WAC

[1] According to RCW 49.17.060, each employer:

296-155-040(1),[2] impose non delegable duties upon a subcontractor, on a multi-employer site, to replace handrails for the protection of all employees, including those not employed by the subcontractor.

A general contractor bears the primary responsibility for employee compliance with safety regulations, because the general contractor's "innate supervisory authority

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(1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees: PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the work place; and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

[2] Safe place standards are set out in WAC 296-155-040 as:

(1) Each employer shall furnish to each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to employees.

(2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do everything reasonably necessary to protect the life and safety of employees.

(3) No employer shall require any employee to go or be in any employment or place of employment which is hazardous to the employee.

(4) No employer shall fail or neglect:

(a) To provide and use safety devices and safeguards.

(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.

(c) To do everything reasonably necessary to protect the life and safety of employees.

(5) No employer, owner, or lessee of any real property shall construct or cause to be constructed any place of employment that is hazardous to the employee.

(6) No person shall do any of the following:

(a) Remove, displace, damage, destroy or carry off any safety device, safeguard, notice, or warning, furnished for use in any employment or place of employment.

(b) Interfere in any way with the use thereof by any other person.

(c) Interfere with the use of any method or process adopted for the protection of any employee, including themselves, in such employment, or place of employment.

(d) Fail or neglect to do everything reasonably necessary to protect the life and safety of employees.

(7) The use of intoxicants or debilitating drugs while on duty is prohibited. Employees under the influence of intoxicants or drugs shall not be permitted in or around worksites. This subsection (7) shall not apply to employees taking prescription drugs or narcotics as directed and prescribed by a physician, provided such use does not endanger the employee or others.

constitutes sufficient control over the workplace." Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 464, 788 P.2d 545 (1990). A subcontractor, however, is only liable to an employee of the general contractor for failure to comply with safety regulations when the dangerous condition was under the control of or created by the subcontractor. Ward v. Ceco Corp., 40 Wn. App. 619, 625, 699 P.2d 814 (1985). In Ward, a general contractor hired Ceco Corporation to erect wooden forms for concrete ramps, slabs, and beams in a new parking garage. 40 Wn. App. at 621. After erecting the wooden forms, including safety railings, Ceco employees sprayed an oil substance onto the forms to facilitate their later release from the concrete. Id. After the general contractor poured the concrete and it cured, Ceco removed the forms and re-erected them to continue the spiraling growth of the garage. Id. In order to facilitate modification of plans, construction stopped at the site. Id. Before leaving the site, Ceco did not erect a guardrail along the edge of the construction. Id. On the following Monday, Robert Ward, a labor foreman, slipped on the edge of the form due to an accumulation of oil that Ceco employees had sprayed on the forms. Id. Ward fell 10 to 14 feet to the level below, and suffered injuries. Id. Ceco employees were not on the site at the time Ward fell. Id.

Based on Ward, Siebert claims that Owens controlled the area of hazard prior to the injury and, "therefore, owed a statutory duty to Dale Siebert to replace or ensure replacement of the missing safety rail before abandoning the area." But Owens argues that it had insufficient control of the danger in order for a duty to exist. Siebert does not contend that Owens created the hazard that caused him to fall, unlike in Ward, where

the subcontractor created the dangerous condition. Instead, he argues that Owens controlled the area where Siebert fell because (1) it worked on Building 1-A in the days preceding the accident, (2) had knowledge that the safety railings were missing, and (3) choose not to repair the railing. These facts are insufficient to establish that Owens controlled the area or created the hazard. It is undisputed that, when performing siding work, Bogart removed the safety railing and failed to replace it. Moreover, Homestead retained supervisory authority over the entire construction site. Homestead employee Dustin Hartman was tasked with ensuring that safety railings were in place throughout the construction site. Mere knowledge of a harm coupled with a failure to act is insufficient to establish control under Ward.[3]

Additionally, unlike Siebert's characterization, Washington law does not require guardrails on heights above 6 feet in all settings. Washington Administrative Code section 296-155-505(3) provides for circumstances when guardrail removal is necessary:

> When guardrails or covers required by this section must be temporarily removed to perform a specific task, the area shall be constantly attended by a monitor to warn others of the hazard or shall be protected by a movable barrier.

Siebert also implies that a subcontractor has a duty to report safety hazards to the general contractor. But, Washington law does not require reporting by the subcontractor. Instead, WAC 296-155-040, mandates that an employer provide safety devices to its employees. Here, Owens concedes it violated Washington law when it failed to provide such devices to its own employees, but it was under no obligation to

[3] Siebert fails to show that failure to report a safety hazard is a violation of Washington law that creates a tort duty to an injured employee of the general contractor.

ensure that Siebert was protected, because it did not create or control the safety hazard.

We hold that Owens did not owe Siebert a duty based on WISHA violations.

III. Contractual Duty

Next, Siebert argues that Owens had a contractual duty to comply with WISHA and other safety regulations, thus creating a duty to him. Siebert specifically points to Article 10 of the Subcontractor Agreement, which establishes working conditions regarding safety:

> The Subcontractor shall submit a written fall protection plan prior to starting Work as required by Contractor. The Subcontractor shall furnish adequate safety equipment and shall meet or exceed ALL safety precautions required by The [sic] Washington State Department of Labor & Industries, WISHA and the Contractor. Any Subcontractor observed not adhering to these safety precautions shall be immediately removed from the hazardous area by Contractor until they adhere to the safety requirements by WISHA and The [sic] Washington State Department of Labor & Industries.

Additionally, Siebert claims Article 11.5.1 also requires Owens to assume a duty to comply with safety requirements:

> The Subcontractor shall take all reasonable safety precautions with respect to his Work, shall comply with all safety measures initiated by the Contractor and with all applicable laws, ordinances, rules, regulations and orders of any public authority for the safety of persons or property in accordance with the requirements of the Contract Documents. The Subcontractor shall report within three (3) days to the Contractor any injury to any of the Subcontractor's employees at the site.

In Washington, "'[l]iability may arise if the subcontractor contractually assumed responsibility for safety precautions at the worksite or is shown to have been in control of the method of performing the work.'" Martinez Melgoza & Assoc., Inc. v. Dep't of

Labor & Indus., 125 Wn. App. 843, 850-851, 106 P.3d 776 (2005) (alteration in original) (quoting Jones v. Halvorson-Berg, 69 Wn. App. 117, 124–25, 847 P.2d 472 (2002)). In Martinez, the contracts required the subcontractor to have personnel immediately available on a 24-hour basis, inspect the safety precautions taken by the contractors, inspect the abatement process, and notify the Asbestos Program Manager when the project passed inspection. Id. Although the contracts did not grant Martinez Melgoza & Associates the authority to stop work, they did allow it to request a stop work order if it concluded the abatement activities did not meet the regulatory requirements. Id. Moreover, the contract required the subcontractor to keep a monitoring, analysis, and inspection log which was "'to be the eyes and ears of the Port.'" Id. The court however declined to determine whether the subcontractor had the right under the contract to control the worksite, finding they exercised control in practice. Id.

In contrast to Martinez, Owens did not have authority or supervisory responsibilities of the Bakerview site under its contract with Homestead. Instead the contract requires compliance with safety regulations with respect to its own work. While Owens may have breached the contract while painting the exterior of Building 1-A without the railings, the contract does not create a duty to an employee of the general contractor.

We hold that the contract between Homestead and Owens did not create a duty to Siebert.

IV. Common Law

Last, Siebert claims that Owens breached its common law duty, because the

injury was foreseeable. Siebert relies an Arizona case, Sarmiento v. Stubblefield's Custom Concrete, Inc., 178 Ariz. 440, 874 P.2d 997 (1994). But in Sarmiento, a duty was only created when the subcontractor created the hazard.[4] As noted by the Supreme Court, "'[f]oreseeablity does not create a duty but sets limits once a duty is established.'" Simonetta v. Viad Corp., 165 Wn.2d 341, 349 n.4, 197 P.3d 127 (2008) (quoting Simonetta v. Viad Corp., 137 Wn. App. 15, 23 n.2, 151 P.3d 1019 (2007)). Here, Owens did not create the dangerous condition. Rather, it merely knew of the lack of safety railings and failed to report it to the general contractor. Because Owens did not create the hazard, it did not trigger a common law duty to Siebert when it failed to report or repair the missing safety railing on Building 1-A.

We affirm.

Appelwick, J.

WE CONCUR:

Cox, J.

Grosse, J.

[4] In Sarmiento the subcontractor cut holes in a floor and left it without barricades. 178 Ariz. at 441. An employee was injured. Id. The court held that even where a general contractor was responsible for erecting the barricades, the subcontractor was liable for creating the risk. Id. at 443.